Propositions and Authorities.

PAGE

1. This writ of error is properly prosecuted under Section 237 of the Judicial Code, as amended by the Act of September 6, 1916 1

United States ex rel Lynch, 137 U. S., 280, 285 (34 L. Ed., 700, 702).

New Mexico ex rel McLean v. Denver & R. G. R. Co., 203 U. S., 38, 47 (51 L. Ed., 78, 85).

United States ex rel. Champion Lumber Co. v. Fisher, 227 U. S., 445, 451 (57 L. Ed., 591, 594).

Williams v. Bruffy, 96 U. S., 176, 183 (24 L. Ed., 716, 717).

New Orleans Waterworks Co. v. Louisiana Sugar Ref, Co., 125 U. S., 18 (31 L. Ed., 607, 612).

Bacon v. Texas, 163 U. S., 207 (41 L. Ed., 132, 136).

Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S., 548 (58 L. Ed., 721, 725).

Reinman v. Little Rock, 237 U. S., 171 (59 L. Ed., 900, 903).

Postal Tel.-Cable Co. v. Richmond, decided March 17, 1919, Adv. Op. Supreme Ct., No. 169, Oct. Term, 1918.

Robbins v. Taxing Dist. of Shelby County, 120 U. S., 489 (30 L. Ed., 694, 697).

Brennan v. Titusville, 153 U. S., 287 (38 L. Ed., 719, 724).

Stockard v. Morgan, 185 U. S., 27 (46 L. Ed., 785, 794).

Caldwell v. North Carolina, 187 U. S., 622 (47 L. Ed., 336, 340).

2. The following recent decisions of this court support the contentions of plaintiffs in error in

their main brief as to what constitutes interstate commerce 7

Weigle v. Curtice Bros. Co., 248 U. S., 285.

The Lobe Co. v. Shaw, 248 U. S., 297, 304.

Rast v. Van Deman & Lewis Co., 240 U. S., 342, 362 (60 L. Ed., 679, 688).

3. The following late decisions are also in accord with our contention that the license tax here imposed for the privilege of making sales is a direct burden upon interstate commerce . 8

Crew Levick Co. v. Pennsylvania, 245 U. S., 292, 295-298 (62 L. Ed., 295, 299).

U. S. Glue Co. v. Oak Creek, 247 U. S., 321, 326-327 (62 L. Ed., 1135, 1140-1141).

See further:

Postal Telegraph-Cable Co. v. Adams, 155 U. S., 688, 695-696 (39 L. Ed., 311, 315), quoted in both the above cases.

Ficklen v. Shelby Co. Taxing Dist., 145 U. S., 1 (36 L. Ed., 601), which is explained and differentiated in Crew Levick Co. v. Pennsylvania, *supra*.

List of Cases Cited and Referred to.

PAGE

Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S., 548 (58 L. Ed., 721, 725).

Bacon v. Texas, 163 U. S., 207 (41 L. Ed., 132, 136).

Brennan v. Titusville, 153 U. S, 287 (38 L. Ed., 719, 724).

Caldwell v. North Carolina, 187 U. S., 622 (47 L. Ed., 336, 340).

Crew Levick Co. v. Pennsylvania, 245 U. S., 292, 295-298 (62 L. Ed., 295, 299).

Ficklen v. Shelby Co. Taxing Dist., 145 U. S., 1 (36 L. Ed., 601).

Hebe Co., The, v. Shaw, 248 U. S., 297, 304.

New Mexico ex rel. McLean v. Denver & R. G. R. Co., 203 U. S., 38, 47 (51 L Ed., 78, 85).

New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co., 125 U. S., 18 (31 L. Ed., 607, 612).

Postal Telegraph-Cable Co v. Adams, 155 U. S., 688, 695-696 (39 L. Ed., 311, 315).

Postal Tel,-Cable Co. v. Richmond, decided March 17, 1919. Adv. Op. Supreme Ct., No. 169, Oct. Term, 1918.

Rast v. Van Deman & Lewis Co., 240 U. S., 342, 362 (60 L. Ed., 679, 688).

Reinman v. Little Rock, 237 U. S., 171 (59 L. Ed., 900, 903).

Robbins v. Taxing Dist. of Shelby County, 120 U. S., 489 (30 L. Ed., 694, 697).

Stockard v. Morgan, 185 U. S., 27 (46 L. Ed., 785, 794).

United States ex rel. Champion Lumber Co., v. Fisher, 227 U. S., 445, 451 (57 L. Ed., 591, 594).

U. S. Glue Co. v. Oak Creek, 247 U. S., 321, 326-327 (62 L. Ed., 1135, 1140-1141).

United States ex rel Lynch, 137 U S., 280, 285 (34 L. Ed., 700, 702).

Weigle v. Culrtice Bros. Co., 248 U. S., 285.

Williams v. Bruffy, 96 U. S., 176, 183 (24 L. Ed., 716, 717).

Supreme Court of the United States

October Term, 1917. No. 872.
October Term, 1918. No. 363.

WILLIAM T. WAGNER, EDWARD WAGNER and SOPHIE WAGNER, Partners doing business under the firm name of W. T. WAGNER'S SONS,
Plaintiffs in Error.

vs.

CITY OF COVINGTON,
Defendant in Error.

In Error to the Court of Appeals of the State of Kentucky.

Supplemental Brief for Plaintiffs in Error.

This writ of error is properly prosecuted under Section 237 of the Judicial Code, as amended by the Act of September 6, 1916.

By reference to the petition and amended petition filed by plaintiffs in error (plaintiffs below), it will be observed that the validity of the ordinances, under which the City of Covington is and was seeking to collect a license for carrying on their business in that city is directly drawn in question in this case on the ground that they are repugnant to Article I, Section 8, Paragraph 3, of the Federal

Constitution. The allegations of the said pleadings as to each ordinance are substantially the same and are as follows (Record, pages 6, 8, and 16), viz:

> "Said provisions of said ordinance, in so far as it is or may be attempted to apply them to the business of plaintiffs in said city, are *invalid, illegal, unconstitutional and in contravention of Article I, Section* 8, *Paragraph* 3, *of the Constitution of the United States of America*, in that said business of plaintiffs in said city is and will be at and during said time interstate commerce, and said provisions, as to plaintiff's said business, amount to and are a restraint upon and regulation of interstate commerce." (Emphasis ours.)

The prayer of each of said pleadings contains the following (Record, pages 9 and 17) viz:

> "they pray that the provisions of said last-mentioned ordinance, (or "said last-mentioned ordinance as amended"), may, for the reasons herein stated, be held void and of no effect in so far as they or any of them relate to the said business carried on by plaintiffs in said City of Covington; and plaintiffs pray that said city and its officers and agents may be restrained and enjoined from enforcing the said provisions" etc., etc.

The answer filed by the City of Covington contains the following denial as to each ordinance (Record, pages 12 and 13), viz:

> "Denies that said provisions of said ordinance, in so far as it is or may be attempted to apply them, to the business of plaintiffs in said city, *are invalid, illegal, unconstitutional, or in contravention of Article I, Section* 8, *Paragraph* 3, *of the Constitution of the United States of*

America, in that said business of said plaintiffs in said city is, and will be, at or during said time, interstate commerce; denies that the business of plaintiffs in the City of Covington, is or will be, at or during said time, interstate commerce; denies that said provisions as to plaintiffs' said business amount to or are, a restraint upon or regulation of, interstate commerce." (Emphasis ours.)

No answer appears to have been filed to the amended petition, but the agreed statement of facts shows the case to have been submitted as though the same had been filed, and an issue made. (Record, pages 20-21).

The trial court decided in favor of the validity of said ordinances, entering a judgment dismissing the plaintiffs' petition. (Record, page 22.)

The Court of Appeals of Kentucky affirmed the judgment of the lower court, using the following language in is opinion. (Record, page 25), viz:

"The City of Covington, through its legislative body, passed an ordinance entitled 'An ordinance fixing and imposing licenses upon certain occupations, professions, and trades, prescribing the manner of the issuing of said licenses, and apportioning the revenue realized therefrom,' by which ordinance it is provided that manufacturers and wholesale dealers in soft drinks shall pay a license tax of One Hundred Fifty ($150) Dollars for the privilege of carrying on their business in the city of Covington. Under this ordinance appellants have for several years back, under protest, paid said license tax of One Hundred Fifty ($150) Dollars, per year, and these actions were instituted to recover the sums thus paid and to restrain the City and its officials from requiring future payments, or interfering

with said officials, it being the contention that appellants are engaged in interstate commerce, and the transactions recited in the agreed state of facts constitute commerce between citizens of different states, and that *the ordinance in question is a restraint upon and interference with such damages, (commerce) and therefore violative of Article I, Chapter 8, Paragraph 3, of the Federal Constitution.* If the transactions referred to constitute interstate commerce, then it would follow that appellants were not subject to such licenses, and are entitled to the relief sought." (Emphasis ours and word in parenthesis supplied.)

Later on in its opinion, in the closing paragraph, the same Court said (Record, page 28):

> "it is not sought to declare the ordinance unconstitutional or void, *except in so far as it affects appellants and interstate commerce.*" (Emphasis ours.)

It is true that the Court of Appeals also said (Record, page 26) that "the ordinances are not assailed, but appellants contend that they being engaged in interstate commerce do not come within the purview thereof," yet, when this statement is taken in connection with the rest of the opinion and the pleadings, it is evident that the court meant appellants were not assailing the right to enact such ordinances so far as intra-state commerce was concerned. This is the only interpretation to be placed on the court's language which will render it consistent and in accord with the facts.

It will be seen, therefore, that throughout the entire record the federal question has been properly raised, and

that same has been submitted to and considered by both the state courts in passing upon the case.

The matter now presented to this Court for examination and determination may be stated to be as follows; viz:

Certain ordinances have been passed and were and are in effect in the City of Covington, Kentucky, requiring a license for wholesaling soft drinks in that city from *all* wholesalers or manufacturers of such products indiscriminately, except that the latest ordinance does not "apply to sales made by manufacturers, wholesalers, persons or firms located outside of the State of Kentucky by way of filling orders previously sent to and received by them at their place of business." (Record, page 16.)

The Court of Appeals of Kentucky has construed said ordinances to apply to a business which plaintiffs in error contend has been repeatedly decided by this court to constitute interstate commerce; and the Court of Appeals has upheld the validity of the ordinances as applied to such commerce.

The question before this court to determine is whether or not, as so construed and applied, the said ordinances are repugnant to Article I, Section 8, Paragraph 3, of the Federal Constitution.

In *United States, ex rel Lisle,* v. *Lynch,* 137 U. S. 280, this court said at page 285 (34 L. Ed., 700, 702):

> "The validity of a statute or the validity of an authority is drawn in question when the existence, or constitutionality, or legality of such statute or authority is denied and the denial forms the subject of direct inquiry."

The above was quoted with approval in *New Mexico, ex rel McLean,* v. *Denver & R. G. R. Co.,* 203 U. S., 38, 47 (51 L. Ed., 78, 85), and in *United States, ex rel Champion*

Lumber Co., v. *Fisher*, 227 U. S., 445, 451 (57 L. Ed., 591, 594).

In numerous decisions of this Court it has been held that a municipal ordinance, when enforced by the judgment of the highest court of the state, is a statute within the meaning of that clause of the Code relating to the court's jurisdiction, and that a question involving the validity of such an ordinance is to be regarded the same as one involving the validity of a statute.

Williams v. *Bruffy*, 96 U. S., 176, 183 (24 L. Ed., 716, 717).

New Orleans Waterworks Co. v. *Louisiana Sugar Refining Co.*, 125 U. S., 18 (31 L. Ed., 607, 612).

Bacon v. *Texas*, 163 U. S., 207 (41 L. Ed., 132, 136).

Atlantic Coast Line R. Co. v. *Goldsboro*, 232 U. S., 548 (58 L. Ed., 721, 725).

Reinman v. *Little Rock*, 237 U. S., 171 (59 L. Ed., 900, 903).

Postal Tel.-Cable Co. v. *Richmond*, decided March 17, 1919, Op. of Supreme Ct., No. 169, October Term, 1918.

It has also been frequently decided by this Court that a statute, or municipal ordinance, may be declared invalid so far as interstate commerce is concerned, although valid as to that commerce which is purely intrastate.

Robbins v. *Taxing Dist. of Shelby County*, 120 U. S., 489 (30 L. Ed., 694, 697).

Brennan v. *Titusville*, 153 U. S., 27 (46 L. Ed., 719, 724).

Stockard v. *Morgan*, 185 U. S., 27 (46 L. Ed., 785, 794).

Caldwell v. *North Carolina*, 187 U. S., 622 (47 L. Ed., 336, 340).

2.

THE FOLLOWING RECENT DECISIONS OF THIS COURT SUPPORT THE CONTENTIONS OF PLAINTIFFS IN ERROR IN THEIR MAIN BRIEF AS TO WHAT CONSTITUTES INTERSTATE COMMERCE.

In *Weigle* v. *Curtice Bros. Co.*, decided January 7, 1919, 248 U. S., 285, this Court had before it the question as to the right of the Dairy & Food Commissioner of the State of Wisconsin to enforce certain laws of that state applicable to sales of food, and it recognized the difference between regulation of sales at retail and those at wholesale, referring to the earlier case of *Rast* v. *VanDeman & Lewis Co.*, 240 U. S., 342, 362 (60 L. Ed., 679).

An examination of *Rast* v. *DanDeman & Lewis Co., supra*, shows that it clearly drew the distinction as to the state's power to license those sales which are made at retail from those made at wholesale in the original "packages of importation." The court said at pages 360-361 (60 L. Ed., 688):

> "The transactions, therefore, are not in interstate commerce. The sales, as we have said, are not in the packages of that commerce, they are essentially local sales, schemes consummated by such sales, and it is upon them and on account of their effect that the statute has imposed its license tax, and not upon the shipment into the state nor their *disposition in the packages of importation.* * * * *Detach the importations from the retail sale, consider only the transportation to the state of merchandise in its original package, being sold therein in such package, and there may, indeed, be interstate commerce.* * * * " (Emphasis ours.)

To the same effect,

The Hebe Co. v. *Shaw*, 248 U. S., 297, 304.

3.

THE FOLLOWING LATE DECISIONS ARE ALSO IN ACCORD WITH OUR CONTENTION THAT THE LICENSE TAX HERE IMPOSED FOR THE PRIVILEGE OF MAKING SALES IS A DIRECT BURDEN UPON INTERSTATE COMMERCE.

Crew Levick Co. v. *Pennsylvania*, 245 U. S., 292, 295-298 (62 L. Ed., 295, 299).

United States Glue Co. v. *Oak Creek*, 247 U. S., 321, 326-327 (62 L. Ed., 1135, 1140-1141).

See further:

Postal Telegraph Cable Co. v. *Adams*, 155 U. S., 688, 695-696 (39 L. Ed., 311, 315), quoted in both the above cases.

Ficklen v. *Shelby Co. Taxing Dist.*, 145 U. S., 1 (36 L. Ed., 601), which is explained and differentiated in *Crew Levick Co.* v. *Pennsylvania, supra.*

Respectfully submitted,

HARRY BRENT MACKOY,

Counsel for Plaintiffs in Error.

WILLIAM H. MACKOY,

Of Counsel.

Signed this ——— day of April, 1919.

_____

_____

Counsel for Plaintiffs in Error.

Index to Argument.

The plaintiffs in error bring their merchandise, consisting of soft drinks, into the City of Covington, Kentucky, from Cincinnati, in the state of Ohio, on their own vehicles, without having received from their customers in said City of Covington, previous orders or requests therefor, and there and then sell and deliver same to the retail dealers in the City of Covington. These transactions are not interstate commerce, nor in any way directly connected with such commerce..... page 11

American Steel & Wire Co., v. *Speed*, 192 U. S., 500, 517, 518.
Armour Packing Co. v. *Lacy*, 200 U. S., 226, 233.
Banker Bros. v. *Pennsylvania*, 222 U. S., 210, 214.
Brennan v. *Titusville*, 153 U. S., 289.
Caldwell v. *North Carolina*, 187 U. S., 622.
Crenshaw v. *Arkansas*, 207 U. S., 398.
Dozier v. *Alabama*, 218 U. S., 124, 127.
Emert v. *Missouri*, 156 U. S., 296, 309, 311, 319.
International Text Book Co. v. *Pigg*, 217 U. S., 91, 106.
Kehrer v. *Stewart*, 197 U. S., 60, 68.
Rearick v. *Pennsylvania*, 203 U. S., 507, 510.
Robbins v. *Shelby Taxing Dist.*, 120 U. S., 489, 493.
Stewart v. *Michigan*, 232 U. S., 665.
Wagner v. *City of Covington*, 177 Ky., 385, 391.

The judgment of the Court of Appeals of Kentucky is based on findings of facts which excludes a Federal question, and which this Court accepts as conclusive; therefore. the writ of error should be denied..... page 10

Chrisman v. *Miller*, 197 U. S., 313-319.

Wagner v. *City of Covington*, 177 Ky., 385, 387.
Waters-Pierce Oil Co. v. *Texas*, 212 U. S., 86, 97.

The writ of error should be denied because the judgment of the Court of Appeals of Kentucky is based on grounds sufficiently broad to sustain it, over which this Court has no jurisdiction..... page 7

California Powder Works v. *Davis*, 151 U. S., 393.
City of Newport v. *Wagner*, 168 Ky., 641.
Garr-Scott & Co. v. *Shannon*, 223 U. S., 468, 473.
Leathe v. *Thomas*, 207 U. S., 93, 98.
Rogers v. *Jones*, 214 U. S., 196, 204.
Wagner v. *City of Covington*, 177 Ky., 385, 388, 390.

The ordinance in question imposes an occupation tax upon all wholesale dealers of soft drinks; the tax imposed being uniform on all persons engaged in such business, whether residents or nonresidents. The ordinance does not therefore, come within the Constitutional inhibition..... page 23

Emert v. *Missouri*, 156 U. S., 296, 311.
Howe Machine Co. v. *Gage*, 100 U. S., 676, 677.
Kehrer v. *Stewart*, 197 U. S., 68, 69.

Authorities Cited.

PAGE.

American Steel & Wire Co. v. Speed, 192 U. S., 500, 517 14-22
Armour Packing Co. v. Lacy, 200 U. S., 233 12
Banker Bros. v. Pennsylvania, 222 U. S., 210, 214 ... 17
Brennan v. Titusville, 153 U. S., 289 19
Caldwell v. North Carolina, 187 U. S., 622 19
California Powder Works v. Davis, 151 U. S., 393 ... 9
Chrisman v. Miller, 197 U. S., 313, 319 11
City of Newport v. Wagner, 168 Ky., 641 7
Cook v. Marshall County, 196 U. S., 261, 273 24
Crenshaw v. Arkansas, 227 U. S., 389 22
Dozier v. Alabama, 218 U. S., 124, 128 18
Emert v. Missouri, 156 U. S., 296, 309, 311, 319 .... 11, 12, 15, 16, 23
Garr-Scott & Co. v. Shannon, 233 U. S., 468, 471 9
Howe Machine Co. v. Gage, 100 U. S., 676, 677 23
International Text Book Co. v. Pigg, 217 U. S., 91, 106 20
Kehrer v. Stewart, 197 U. S., 60, 68 ..... 16, 23
Leathe v. Thomas, 207 U. S., 93, 98 9
Robbins v. Shelby Taxing Dist., 120 U. S., 489, 493 .. 12
Rogers v. Jones, 214 U. S., 196, 204 9
Rearick v. Pennsylvania, 203 U. S., 507 19
Stewart v. Michigan, 232 U. S., 665 22
Wagner v. City of Covington, 177 Ky., 385 .... 7, 8, 9, 10, 13, 21
Waters-Pierce Oil Co. v. Texas, 212 U. S., 86, 97 ... 11

Supreme Court of the United States

WILLIAM T. WAGNER, EDWARD WAGNER and SOPHIE WAGNER, Partners doing business under the firm name of W. T. WAGNER'S SONS,
Plaintiffs in Error,

vs.

THE CITY OF COVINGTON,
Defendant in Error.

In Error to the Court of Appeals of Kentucky.

Brief for Defendant in Error.

STATEMENT OF THE CASE.

The plaintiffs in error are engaged in the manufacture of certain drinks, namely, vichy, lithia, sodium phosphate, ginger ale, club soda and distilled, artificial mineral and medicinal waters, commonly known as "soft drinks." Their plant and bottling works are located in Cincinnati, Ohio. The defendant in error, the City of Covington, which is located in the State of Kentucky, is a municipal corporation, under the laws of said state, and is connected with Cincinnati by means of bridges across the Ohio River.

By this proceeding, the plaintiffs in error seek to have reviewed a judgment of the Court of Appeals of Kentucky, holding them liable to the payment of the occupation or merchant tax imposed by an ordinance of the City of Covington, upon the business conducted by the plaintiffs in error therein. (*Wagner et al* v. *City of Covington,* 177 Ky., 385.)

Incidental to the determination of the validity of the ordinance, plaintiffs in error seek to recover from the defendant in error, license fees paid by them to said city under said ordinance for the years 1910 to 1913 both inclusive, amounting to Six Hundred ($600) Dollars. The parts of the ordinance pertinent to this case, are sections one and thirteen, which are as follows:

> "Section 1. That it shall be unlawful for any person to engage in any occupation, profession, or trade hereinafter mentioned, without first obtaining a license therefor as hereinafter prescribed.
>
> "Section 13. The business, calling, occupation, profession or trade, license for which is required herein, together with the amount annually, except as otherwise specifically set out, to be charged for the same, is as follows:
>
> "Soft drinks, extracts, and all other finished and unfinished drinks, other than a liquid usually known as spiritous, vinous or malt liquors —wholesaler, manufacturer, or firm or persons engaged in the sale thereof, in the City of Covington; provided, that this shall not apply to sales made by manufacturers, wholesalers, persons or firms located outside of the State of Kentucky, by way of filling orders previously sent to and received by them at their place of business, $150." (Record, pp. 14, 15.)

Plaintiffs in error, to defeat the payment of the tax

imposed, rely on the defense that they are engaged in interstate commerce, and the merchandise when sold, is in the original packages. Attention is respectfully called to the agreed statement of facts, parts of which we quote, and which are found on pages 18, 19 and 20 of the record:

> "Their vehicle makes two or three visits a week to the retail dealers in said city, whose names are on their list for the purpose of ascertaining what amounts of 'soft drinks' each of them may need or desire to purchase of plaintiffs. * * *
>
> "When a customer's place of business is reached by the vehicle, said driver goes into the store-room and either asks or looks to see what amount of drinks is needed or wanted. He then goes out to the vehicle and brings from it the necessary amount which he carries in to the store and delivers to the customer. * * * Said retail dealers are not bound in any way to the purchase of any amount of said waters when the aforesaid calls are made upon them by said drivers of plaintiff.
>
> "Said drinks are in fastened or stopped bottles or siphons, according to their nature. These bottles or siphons are placed at the bottling works in Cincinnati, Ohio, in separate, distinct, wooden or metal cases, each case being open at the top and holding a certain number of siphons or bottles, as the nature and kind of the drinks may require and according to the custom of plaintiffs and of those persons who manufacture or deal in said drinks, and who constitute the trade. * * * Said drinks in said bottles or siphons are carried on said vehicle in said cases and sold and delivered in them, each case remaining entire and unbroken from point to point of deliv-

ery. Nothing less than a case is ever sold or delivered, and the contents of said case are not mixed or changed from the way they are put up

"Said retail dealers usually pay cash and simply purchase the water contained in said bottle, *but the bottles and cases,* except as hereinafter mentioned, *always remain the property of the plaintiffs,* and are subsequently collected by plaintiff's drivers or agents on said regular calls, or visits, if found empty. There are few customers who pay for and thereafter own the bottle in which distilled water is delivered." (Italics ours.)

Plaintiffs use horse drawn vehicles or automobiles, as a means of transporting the merchandise in question from the City of Cincinnati, into the City of Covington, where it is driven from place to place for the purpose of selling and delivering the waters manufactured by them. There is no "shipping" or "packing" of the goods, as these terms are ordinarily used in the commerce decisions of this Court. The wagon is loaded and the driver hauls his entire load from the City of Cincinnati into the City of Covington, relying for its sale solely upon the "probable demands of the customers, based on past experience." (Record, p. 19.) All of the products of the plaintiff in error, with the possible exception of distilled water, which constitutes a very small portion of the business, consists of beverages, which are charged with a carbonate of soda in the form of a gas, and which causes the drink to effervesce on being exposed to the air. This characteristic of these drinks necessitates their being put in airtight glass containers, holding approximately a half pint each; the siphons containing seltzer and the bottles containing distilled waters holding perhaps as much as one quart each. The smaller bottles are designed for

individual consumption, and for protection they are put in open wooden or metal cases which are, in fact, nothing more than an open box-frame into which the bottles are placed as a matter of protection and convenience for handling and hauling. There is no packing or sealing of the cases for shipment, the wooden or metal cases being identical in all respects with those used in the factory of the plaintiffs in error for convenience in handling. There is no marking or stamping of these cases, except to indicate the ownership of the plaintiffs in error, to whom they are returned when the waters carried therein are sold by their customers. As the bottles are emptied they are replaced in the cases, and the driver on his next trip replaces the cases containing the empty bottles with another case containing filled bottles, taking the case containing the empty bottles back to the factory, and thus, day by day, the business is carried on. No particular case is consigned to a particular customer. If the demand of the first customer called on, is great enough to take the entire wagon load, the driver sells and delivers to this customer his entire load, and returns to the factory for another load, and peddles that out in the same way. If for any reason, the demand of the customers of plaintiff in error for the drinks, is not sufficient to exhaust his entire wagon load, the driver returns to the factory with the part of the load undisposed of.

In special instances, however, the same wagon as a matter of convenience, is used to deliver goods which have been previously ordered by telephone. The ordinance in question specifically exempts from its operation, business done in this manner.

The statement of facts alternately refers to the person in charge of the business of plaintiffs in error in the City

of Covington, as a "driver" or as an "agent." It is the business thus carried on and conducted by this driver or agent, which the City of Covington contends renders the plaintiffs in error liable to the payment of the license tax imposed under the provisions of said ordinance.

While it is true that no warehouse, store-room or office is kept or maintained by the plaintiffs in error, within the corporate limits of the City of Covington, nevertheless the wagon or the motor truck carrying the supply of goods, and from which the customer is supplied, answers the purpose of a store-room in supplying its trade in Covington. There is no previous negotiation or contract or understanding between the customer in the City of Covington, and the plaintiffs in error in the City of Cincinnati, before the goods are brought into Covington, that such customer will buy a particular case or cases, or any case of the goods sold by plaintiffs. At most, the plaintiffs in error have a good will which justifies them in sending out their drivers in the belief that those who have previously bought from them, may do so again.

The defendant in error contends that the writ of error should be denied, for the following reasons:

First: Because the judgment of the Court of Appeals of Kentucky is based on grounds sufficiently broad to sustain it, over which this Court has no jurisdiction.

Second: Because the judgment of the Court of Appeals of Kentucky is based on a finding of facts which excludes a Federal question, and which this Court accepts as conclusive; therefore, the writ of error should be denied.

Third: The plaintiffs in error bring their merchandise, consisting of soft drinks, into the City of Covington, Kentucky, from Cincinnati, in the State of Ohio, on their own vehicles, without having received from their customers in said City of Covington, previous orders or requests

therefor, and there and then sell and deliver same to the retail dealers in the City of Covington. These transactions are not interstate commerce, nor in any way directly connected with such commerce.

ARGUMENT.

We will consider these propositions in their respective order.

I.

The writ of error should be denied because the judgment of the Court of Appeals of Kentucky is based on grounds sufficiently broad to sustain it, over which this Court has no jurisdiction.

It will be observed that the ordinance does not impose the payment of the license tax on the sale of goods brought by the plaintiffs from Ohio into Covington, Kentucky, for the purpose of "filling orders previously sent to or received by them at their place of business." It is true that commingling with the goods brought by plaintiffs' agents into the City of Covington for sale, are goods which were previously ordered by a chance customer. But the tax is not imposed on this character of sales, either by the ordinance or the decision of the Court of Appeals. (177 Ky., 385.) On page 388 of the opinion the Court of Appeals quoting from the case of *City of Newport* v. *Wagner*, 168 Ky., 641, said:

> "In the case at bar some of the transactions were, without doubt such transactions in interstate commerce as would not render the appellees liable for the license tax, which was imposed upon a wholesale dealer in Newport by the or-

dinance, but the transactions, when appellees, without having received any order for the shipment of goods from their place of business in Cincinnati, and without any contract for their delivery, brought the goods into Kentucky and into Newport, and there exposed them for sale, and sold and delivered them, these were transactions in Kentucky, the contract, sale and delivery. The mere fact that appellees contemplated that some one, who had previously purchased goods, would purchase the goods when they should be exposed for sale, in Newport, could not be construed into a negotiation between citizens of different states, for the sale of goods then in one state to be delivered in another; neither was there any contract of sale of such goods, except in Kentucky. So far as the sales made in Kentucky were concerned, when made after the goods were brought into Newport, and without any previous negotiations for the purchase of the goods by the persons by whom they were purchased and to whom they were delivered in Newport, the appellees were simply doing business as wholesale dealers in soft drinks, wholly within the City of Newport, although the goods had their origin in Ohio. * * *."

The Court after quoting from the Newport case, said:

"All that was said in the case of the City of Newport against Wagner * * * is equally true in the three cases under consideration."

On page 390, the Court of Appeals of Kentucky further said:

"If a dealer in Covington, Kentucky, should by telephone call up one of appellants in Cincinnati, Ohio, and say, 'Please send me a case of your goods by your wagon today,' there could

be no doubt the transaction was one in interstate commerce, when the goods were delivered in the original package. But where without such order, or any order, and upon the mere expectation of finding a purchaser, goods are sent across the state line with the hope of finding a purchaser and delivering the goods, the acts which constitute the sale of the goods are entirely within Kentucky. No part of it takes place in the state of Ohio."

Although considering the federal question involved, the judgment of the Court of Appeals is based on other grounds not involving a federal question, thereby bringing this case within the well recognized rule of this Court, that:

"* * * in order to give this court jurisdiction on writ of error to the highest court of a state in which a decision in the suit could be had, it must appear affirmatively not only that a Federal question was presented for decision by the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. And where the decision complained of rests on an independent ground, not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed by this court without considering any Federal question that may also have been presented."

California Powder Works v. *Davis,* 151 U. S., 393.
Leathe v. *Thomas,* 207 U. S., 93, 98.
Rogers v. *Jones,* 214 U. S., 196, 204.
Garr-Scott & Co. v. *Shannon,* 223 U. S., 468, 471.

II.

The judgment of the Court of Appeals of Kentucky is based on finding of facts which excludes a Federal question, and which this Court accepts as conclusive; therefore, the writ of error should be denied.

The Court of Appeals of Kentucky in deciding this case, made a finding as to the facts upon which it based its conclusions of the law. In this respect on pages 387 and 388, that Court said:

> "By the agreed state of facts, it is shown that appellants, through their agents, load vehicles in Cincinnati, with the goods in question, and these goods are carried by such vehicles across the river into Kentucky without orders from such prospective purchasers first having been transmitted to appellants in Cincinnati. The drivers of the vehicles are solicitors and take and fill orders from these wagons. They drive up to the place of a customer and ascertain, by inquiry or otherwise, whether he desires to purchase goods; if he does, then a package or packages, are delivered, according to his wishes and direction, at an agreed price. The whole negotiations are then and there conducted and concluded. It is wholly made in the City of Covington, and State of Kentucky."

The Court of Appeals of Kentucky excluded from consideration any delivery of goods brought into the City of Covington to fill an order received by them while such goods were in Cincinnati, Ohio, but upheld the validity of the ordinance on the grounds that the goods were brought into Kentucky where the "whole negotiations were then and there conducted and concluded." In this

respect therefore, this case falls within the law applied by this Court, namely:

> "Nor does this Court sit to review the findings of facts made in the State Court, but accepts the findings of the Court of the State upon matters of fact as conclusive, and is confined to a review of questions of Federal Law within the jurisdiction conferred upon this Court."
>
> *Waters-Pierce Oil Co.* v. *Texas,* 212 U. S., 86, 97.
> *Chrisman* v. *Miller,* 197 U. S., 313, 319.

III.

The plaintiffs in error bring their merchandise consisting of soft drinks, on their vehicles, into the City of Covington, Kentucky, from Cincinnati, Ohio, without having received from their customers in said City of Covington, previous requests or orders therefor, and there and then sell and deliver same to the retail dealers in the City of Covington. Such transactions are not interstate commerce, nor in any way connected with such commerce.

This Court has defined the limitations of the taxing powers of a state on goods shipped from one state to another as follows:

> "When goods are sent from one state to another for sale or in consequence of a sale, they become part of its general property and amenable to its laws. * * * But to tax the sale of such goods, or offer to sell them *before* they are brought into the state, is a very different thing, and seems to us clearly a tax on interstate commerce itself. The negotiations of the sale of goods which are in another state for the purpose of introducing them into the state in which the negotiations are made, is interstate com-

merce." (Italics ours.) *Emert* v. *Missouri*, 156 U. S., 296, 319.

And, if a business consists solely of shipping goods from one state to another, "consigned directly to purchasers on orders previously obtained, it is clear that this would be interstate commerce, and a tax laid by the state upon such business would be illegal." *Armour Packing Company* v. *Lacy*, 200 U. S., 226, 233.

Therefore, the test whether a transaction constitutes interstate commerce, is whether the subject matter of the sale is within the jurisdiction of the state when the sale is made.

The rule exempting goods sold in "original packages" is applicable only when the movement of such goods between states, has its inception in an interstate transaction. In this case, the goods are brought into the City of Covington, Kentucky, sold and delivered there and then to the vendee, and money collected for the same, yet, counsel for plaintiffs in error contends that these goods never reach their destination, or they are brought into the City of Covington for a temporary purpose. By this contention, counsel merely attempts to bring this case within a line of cases decided by this Court, in which it is said:

> "* * * a state can not impose taxes upon persons passing through the state or coming into it merely for temporary purposes, especially if connected with interstate or foreign commerce. * * *." (120 U. S., 489-493.)

The facts in this case do not justify or support such contention. The goods in question are brought into the City of Covington, Kentucky, from Cincinnati, Ohio, for

the purpose of selling them. There is no original package within the meaning of that term in the interstate commerce decisions of this Court. Neither the bottles containing the water, nor the wooden or metal cases containing the bottles, are sold, but "always remain the property of the plaintiffs." The Court of Appeals of Kentucky in its finding of facts in this case, says:

> "The drivers of the vehicles are solicitors and take and fill orders from these wagons. They drive up to the place of a customer and ascertain, by inquiry or otherwise, whether he desires to purchase goods; if he does, then a package or packages, are delivered, according to his wishes and direction, at an agreed price. The whole negotiations are then and there conducted and concluded. It is wholly made in the City of Covington, and State of Kentucky."

Can it be said that goods brought into Kentucky from Ohio and sold, never reach their destination, or never come to rest, or are brought into Kentucky for temporary purposes only, notwithstanding the fact, that these goods are sold off the wagon and delivered to plaintiffs' customers in the City of Covington? The transaction, rather than the origin of the thing sold, determines whether the goods are moving in interstate commerce. Some of the goods brought into the City of Covington, Kentucky, are to fill orders previously taken while the goods are in Ohio. It is apparent from the wording of the ordinance itself, as well as the decision of the Court of Appeals, that the license tax is not imposed upon business thus done; and if plaintiffs were so conducting their business in the City of Covington, as to entitle it immunity from license tax on the ground that it was engaged in interstate commerce, by the terms of the ordi-

nance itself, they would be excluded from such tax.

The payment of license tax by plaintiffs in error under this ordinance for the years 1910 to 1913 inclusive, may be fairly construed as an admission by them, that they were wholesalers of "soft drinks" in the City of Covington, and therefore liable to the license tax provided by the ordinance.

The cases decided by this Court sustain the principle contended for by the defendant in error in this case, namely, that goods brought into a state from another state, for the purpose of selling them, is not interstate commerce, and therefore, is subject to state regulation. On the other hand, where goods are brought into a state from another state for the purpose of filling orders previously taken for such goods, while such goods were in the state from which they were shipped, is movement of goods in interstate commerce, and is not subject to state regulation.

The decision of this Court in the case of *American Steel & Wire Company* v. *Speed*, 192 U. S., 500, is, it seems, a complete answer to plaintiffs' contention with reference to the original package. On pages 517 and 518, the Court said:

> "Complainant's goods are put up in the following original packages: The nails and staples are put in kegs, each keg weighing one hundred pounds; the smooth wire in coils, tied by wires, and each coil weighing one hundred pounds; the barbed wire on reels, and wire on each reel weighnig one hundred pounds. Each package is separately and distinctly made up at the factories *for convenience of transportation*, and is in this form delivered to common carriers. In this form they are delivered at the initial point of transportation. In this form they are trans-

ported in barges or by railroads to Memphis, and received by the Patterson Transfer Company. In this form they are assorted at the warehouse by the Patterson Transfer Company and delivered by it to complainant's customers at Memphis, under circumstances previously stated. * * * Each package is separate and distinct in itself, and while no particular package is consigned to any special customer, each keg of nails and staples is marked so as to show exactly what the package contains, and each coil and reel of wire is marked with a tag, showing what the coil or reel contains, and no package is ever changed in any particular from the time it leaves the factory until it ultimately reaches the hand of the customer." (Italics ours.)

In the case of *Emert* v. *Missouri*, 156 U. S., 296, this Court said, on page 309:

"The facts were agreed, that the Singer Manufacturing Company, for more than five years last past, and on the day in question, was a corporation of New Jersey; that the defendant, on and prior to that day, was in the employment of that company, and on that day, in pursuance of that employment, and having no peddler's license, was engaged in going from place to place in Montgomery county in the State of Missouri, with a horse and wagon, soliciting orders for the sale of the company's sewing machines, and having with him in the wagon one of those machines, the property of the company, and manufactured by it at its works in New Jersey, and which it had forwarded and delivered to him for sale on its account; and that he offered this machine for sale to various persons at different places, and found a purchaser, and sold and delivered it to him."

This is the state of facts presented in the instant case. There can be no doubt that the sewing machine sold by Emert was in the crate in which it was shipped from New Jersey into the State of Missouri. The thing looked to by the court in confirming the conviction of Emert was the manner in which the sales were made or the transaction conducted, namely, that the machines were carried about with him, sold, and delivered without previous order or contract therefor. This Court on page 311 of the opinion in this respect said:

> "The defendant's occupation was offering for sale and selling sewing machines, by going from place to place in the State of Missouri, in a wagon, without a license. There is nothing in the case to show that he ever offered for sale any machine that he did not have with him at the time. His dealings were neither accompanied nor followed by any transfer of goods, or of any order for their transfer, from one State to another; and were neither interstate commerce in themselves, nor were they in any way directly connected with such commerce."

In the case of *Kehrer* v. *Stewart*, 197 U. S., 60, 68, this Court said:

> "So, in the case under consideration it was expressly held by the Supreme Court of Georgia that that part of the Nelson Morris & Company's business, which consisted in shipping goods to Atlanta to fill orders previously received, the goods being delivered in accordance with such orders, was interstate commerce, not subject to taxation within the State, and that, so far as applied to that business, the tax was void. Accepting this construction of the Supreme Court, we think the act, so far as applied to domestic

business, is valid. The record does not show what proportion of such business is interstate and what proportion is domestic, although it is conceded that most of the business is interstate in its character. If the amount of domestic business were purely nominal, as, for instance, if the consignee of a shipment made in Chicago upon an order filled there, refused the goods shipped, and the only way of disposing of them was by sales at Atlanta, this might be held to be strictly incidental to an interstate business, and in reality a part of it, as we held in *Crutcher* v. *Kentucky,* 141 U. S., 47; but if the agent carried on a definite, though a minor, part of his business in the State by the sales of meat there, he would not escape the payment of the tax, since the greater or less magnitude of the business cuts no figure in the imposition of the tax. There could be no doubt whatever that, if the agent carried on his interstate and domestic business in two distinct establishments, one would be subject and the other would not be subject to the tax, and in our view it makes no difference that the two branches of business are carried on in the same establishment. The burden of proof was clearly upon the plaintiff to show that the domestic business was a mere incident to the interstate business."

In that case the courts of Georgia held that the statute was void as to so much of the goods as were shipped "to fill orders previously received," and to the same effect is the holding of the Court of Appeals in the instant case.

Banker Bros. v. *Pennsylvania,* 222 U. S., 210, was a case in which George N. Pierce Company was to build for and sell automobiles to Banker Bros. Co. at 20 per cent. less than list price, deliveries to be f. o. b. Buffalo, and payments to be made in cash. Banker Bros. paid

cash for the automobiles and sold them to their customers in Pittsburg; Pierce Company would ship the automobile to Banker Bros., and would draw on them for the list price, less 20 per cent.; Banker Bros. would then deliver it to the buyer on his paying the purchase price. It was contended that Banker Bros., were agents of the Pierce Company, and that the sale of automobiles thus conducted by Banker Bros., was an interstate transaction. This Court on page 214, said:

> "The contract was made in Pennsylvania and was there to be performed by the delivery of the automobile and the payment of the balance of the purchase price. (See *Am. Steel & Wire Co.* v. *Speed*, 192 U. S., 500; *Am. Express* v. *Iowa*, 196 U. S., 133-146. The Court properly held it was not an interstate transaction but taxable under the laws of the State of Pennsylvania."

The importance that this Court has attached to the necessity of some previous interstate contract may be seen in the case of *Dozier* v. *Alabama*, 218 U. S., 124-128. Mr. Justice Holmes, in delivering the opinion of the Court says:

> "It was agreed that the frame should be offered along with the picture. The offer was a part of the interstate bargain, and as it was agreed that the frame should be offered at 'factory prices' and the company and factory were in Chicago, obviously it was contemplated, it not agreed, that the frame should come with the picture. In fact, the frames were sent on with the pictures from Chicago, and were offered when the pictures were tendered, as part of a transaction commercially continuous, and one at prices generically fixed by the contract for the pictures, and by that contract represented to be

> less than retail or usual prices, in consideration, it is implied, of the purchase already agreed to be made. We are of the opinion that the sale of the frames can not be so separated from the rest of the dealing between the Chicago Company and the Alabama purchaser as to sustain the license tax upon it."

From this language it is apparent that had it not been for this "interstate bargain" and the provision in the contract calling for the shipment of the picture frames from Chicago, this Court would have held that the plaintiff in error was guilty of violating the Alabama statute involved.

In the case of *Caldwell* v. *North Carolina*, 187 U. S., 622, the agreed statement of fact recited that "the defendant, being employed by the Chicago Portrait Company, a foreign corporation of Chicago, Illinois, came to Greensboro for the purpose of delivering picture frames for which contracts of sale had been previously made by other employees of the Chicago Portrait Company, who had preceded the defendant in Greensboro."

Also, the case of *Rearick* v. *Pennsylvania*, 203 U. S., 507, the agreed statement of fact there shows that the groceries shipped by the Ohio corporation from Columbus were pursuant to orders solicited in Pennsylvania, forwarded to Columbus and filled there, and further "no shipments were made to the defendant except to fill such orders, and no deliveries were made by him except to the parties named on the packages." (P. 510.)

Likewise the case of *Brennan* v. *Titusville*, 153 U. S., 289, the agreed statement of fact there recites, "upon receiving orders for pictures and picture frames, the agent of the said J. A. Shephard forwarded the same to him in Chicago, in the State of Illinois, where the goods

were made, and from there shipped by said J. A. Shephard to the purchasers in Titusville in the State of Pennsylvania." In each of these cases, this Court held the transactions to be in furtherance of interstate commerce.

In the case of *International Text-Book Company* v. *Pigg*, 217 U. S., 91, 106, we find this language:

> 'Intercourse of that kind, between parties in different states—particularly when it is in execution of a valid contract between them—is as much intercourse in the constitutional sense as intercourse by means of the telegraph."

In the case at bar, we have nothing that can be said to be a contract pursuant to which, the goods were brought from Ohio into the City of Covington, Kentucky, and delivered to its customers. The transaction of sale and delivery took place after the goods were brought into the City of Covington, and are therefore neither interstate commerce transactions in themselves, or di-directly connected with such commerce.

The brief for the plaintiff in error states that Kentucky stands alone in holding that persons who import goods in original packages from one state to another have not the right to sell them in such packages in the latter state, as the necessary incident to the right to import them without being subject to state regulation and control. No better statement of the attitude of the Court of Appeals of Kentucky can be found than in the case from which this appeal comes. The Court of Appeals, in deciding this question does hold that the plaintiffs in error were liable for the license paid, but that Court does not base its opinion upon the ground that interstate shipments in original packages are subject to state regulation or control. The opinion expressly recognizes the

contention made by the plaintiffs in error, but challenges the application of the principle contended for, to the state of fact presented in that court and now presented here for adjudication. Any doubt about the attitude of the Court of Appeals of Kentucky is very easily removed by reference to the opinion of that court in this case (page 390), where it is said:

> "The moment the driver halts his vehicle in front of a retail dealer's place of business, for the purpose of negotiating a sale, and there exposes his goods for sale, the goods obtain a situs and are subject to the laws and taxing power of the Commonwealth. It does not matter that the goods are sent into Kentucky with instructions to the drivers to return those not sold, if any part remains unsold, after visiting all of the former customers, to the factory in Ohio. Neither does it matter that a part of the goods make an entire circuit on some occasions. *The test seems to be the passing of negotiations between the manufacturer in one state, on the one hand, and the prospective purchaser in a different state on the other.* If a dealer in Covington, Kentucky, should by telephone call up one of the appellants in Cincinnati, Ohio, and say, 'Please send me a case of your goods by your wagon today,' there could be no doubt the transaction was one of interstate commerce when the goods were delivered in the original package. But where, without such order or any order, and upon the mere expectation of finding a purchaser, goods are sent across the state line with the hope of finding a purchaser and delivering the goods, the acts which constitute the sale of the goods are entirely within Kentucky. No part of it takes place within the State of Ohio." (Italics ours.)

As we have seen, in the case of *American Steel & Wire Company* v. *Speed, supra,* the mere form in which an article is transported can not always be looked to as determining whether it is in fact an original package, and whether every subsequent transaction with reference to that particular unit of merchandise is in furtherance of interstate commerce. The holding of the Court of Appeals of Kentucky is not based upon the original package, so much as it is based upon the finding that the merchandise of the plaintiffs in error had a situs in Kentucky, which rendered it liable to taxation. And this primarily because of the fact that an out-and-out sale was made from the wagon without any pre-existing contract or obligation.

We find this court, in the case of *Crenshaw* v. *Arkansas,* 227 U. S., 389, again reviewing and affirming the decision in the Emert case. In this later case the attempt had been to convict the plaintiff in error as a peddler, while he was traveling through the State of Arkansas soliciting orders for ranges, which orders were to be filled and shipped from St. Louis. A sample stove was carried upon the wagon used by Crenshaw, but no sale was made of that stove and this court looks to this fact as distinguishing and controlling, so much so that the conviction in the Emert case was justified, while in the Crenshaw case it was condemned. The court does not concern itself about the manner in which the particular shipment was crated or handled, as determining whether it was not part of an interstate shipment.

To the same effect is the case of *Stewart* v. *Michigan,* 232 U. S., page 665, although in this case a reversal was required because of the error of the lower court in the instruction.

DISCRIMINATION.

The ordinance in question imposes the tax upon all wholesalers of soft drinks; there is no discrimination in favor of the manufacturer and wholesaler in Kentucky, the tax imposed being uniform on all wholesalers, resident or non-resident; it does not therefore come within the constitutional inhibition. This Court in case of *Howe Machine Co.* v. *Gage*, 100 U. S., pages 676, 677, said:

> "Where a state imposes the same rate of taxation upon like articles, whether brought from another state or the products of the state imposing the tax, the tax may be enforced."

And in the case of *Emert* v. *Missouri, supra,* this Court on page 311 of that opinion said:

> "The statute in question is not part of a revenue law. It makes no discrimination between residents or products of Missouri and those of other states."

And in the case of *Kehrer* v. *Stewart, supra,* on page 69, this Court said:

> "There is no discrimination in favor of the agents of domestic houses, and while we may suspect that the act was primarily intended to apply to agents of ultra state houses, there is no discrimination upon the face of the act, and none, so far as the record shows upon its practical administration. As we have frequently held, the state has the right to classify occupations and to impose different taxes upon different occupations."

To declare the tax in question void, would in effect give plaintiffs in error an advantage over citizens of Covington, Kentucky, engaged in the same business. The purposes of the Commerce Clause of the Federal Constitution and Acts of Congress thereunder, are not to give an advantage to a citizen of a foreign state over a resident in matters of commerce, but rather that commerce between the states should be free among the citizens of the several states.

The plaintiffs in error are seeking to evade the payment of the license tax in question, and if they succeed in having this ordinance declared void as to themselves, they will thereby obtain an advantage over resident wholesale dealers in "soft drinks." As soon as their goods enter the City of Covington, they enjoy all the protection under the laws that is afforded the goods of a resident dealer. This Court in the case of *Cook* v. *Marshall County*, 196 U. S., 261, 273, in commenting on the commerce provision of the Constitution said:

> "While this court has been alert to protect the rights of non-resident citizens and has felt it its duty, not always with the approbation of the state courts, to declare the invalidity of laws throwing obstacles in the way of free intercommunication between the States, it will not lend its sanction to those who deliberately plan to debauch the public conscience and set at naught the laws of a State. The power of Congress to regulate commerce is undoubtedly a beneficent one. The police laws of the State are equally so, and it is our duty to harmonize them. Undoubtedly a law may sometimes be successfully and legally avoided if not evaded, but it behooves one who stakes his case upon the letter of the Constitution not to be wholly oblivious of its spirit."

The Commerce Clause of the Constitution was designed as a shield to prevent vexatious interference of the States in the movement of traffic in interstate commerce. Where merchandise is brought into a state, carried about from place to place and offered for sale, and sold and delivered, and the sale price therefor collected, such transaction does not constitute interstate commerce under the decisions of this Court. Such were the methods used by the plaintiffs in error in the sale of their goods in the City of Covington, Kentucky. They were engaged in the business of selling soft drinks by wholesale within the City of Covington, and therefore should pay the occupation tax imposed by the City ordinance.

The writ of error should be denied, or the decision of the Court of Appeals of Kentucky affirmed; all of which is,

Respectfully submitted,

A. E. STRICKLETT,
Solicitor for City of Covington,
Defendant in Error.

[redacted]

Supreme Court of the United States

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Supplemental Brief for Defendant in Error

[redacted]

Supreme Court of the United States.

October Term 1919. No. 61.

WILLIAM T. WAGNER, EDWARD WAGNER and SOPHIE WAGNER, Partners doing business under the firm name of W. T. WAGNER'S SONS,

Plaintiffs in Error,

vs.

CITY OF COVINGTON,

Defendant in Error.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

This Court in a recent case emphasizes the principle contended for in the original brief, that the transaction, rather than the origin of the commodity sold, determines whether the goods are moving in interstate commerce, and that there must be some previous interstate transaction pursuant to which the goods are moving from one state to another, in order that a given transaction may be classed as interstate commerce. We respectfully call the Court's attention to the case of *Kermeyer* v. *Kansas*, 236 U. S., 568-570, in which the Court said:

> "The essential facts disclosed by the record are summarized in pararaphs (a) and (b) following.

"(a) Rigorous statutes have long prohibited the sale of intoxicating liquors within the State of Kansas. The city of Leavenworth lies on the Missouri River; on the opposite bank in Missouri is Stillings, a village with one store, roundhouse, a few residences, eight or ten beer warehouses, and a freight depot without a regular agent, but no postoffice. For a long time plaintiff in error has resided in Leavenworth and prior to 1907 he carried on there an illicit beer trade; for use in the same he there maintained a business place and warehouse and kept wagons and teams. In that year, alarmed by the activities of officials, he discontinued this office and warehouse and immediately opened others in Stillings and connected them with the Leavenworth telephone exchange. He did not change his residence nor remove his wagons and teams from Leavenworth but kept them in quarters connected by telephone with the local exchange and continued to use them for hauling to and from the new warehouse and making deliveries. Thereafter he received at Stillings barrels, cases and casks of beer in carload lots from Kansas City and other points; sometimes he received like merchandise at the railroad depot in Leavenworth which was then hauled across the river. At the Stillings office he received and accepted orders for beer to be delivered in Leavenworth and other points in Kansas. Eighty-five per cent. came by telephone; the remainder through the Leavenworth postoffice, but these were carried to his place of business before being opened.

"(b) Accepted orders for delivery in Leavenworth were filled by setting aside the cases, kegs or casks in the warehouse, tagging them

with the names of the purchasers and then sending them daily—sometimes oftener—over the bridge in his wagons to the residences of purchasers. For such deliveries no charges were made. If the goods were intended for other points in Kansas they were hauled to the railroad station at Leavenworth and there turned over to the carrier. The business for the most part was "family trade" for private use only and amounted to some $500 per month. A license tax was paid to the Federal Government; also merchant's and *ad valorem* taxes to Missouri; he had no Kansas license. The empty cases were gathered up by the drivers throughout Leavenworth, loaded in cars there and shipped to some other State. Advertisements in two Leavenworth papers announced his business and location at Stillings, and likewise gave the telephone number at the horse barn. When parties desiring beer called over this telephone they were advised to call the Stillings office. Collections were usually made by the plaintiff in error or by collectors; sometimes by mail. Drivers received no orders from purchasers.

"The instant cause arose before passage of the Act of Congress, approved March 1, 1913, c. 90, 37 Stat., 699, known as the Webb-Kenyon Bill; consequently neither its construction nor application is now involved; and what is said herein, of course, has reference to conditions existing prior to that enactment.

"Former opinions of this court preclude further discussion of these propositions: Beer is a recognized article of commerce. The right to send it from one State to another and the act

of doing so are interstate commerce, the regulation whereof has been committed to Congress; and a state law which denies such right or substantially interferes with or hampers the same is in conflict with the Constitution of the United States. Transportation is not complete until delivery to the consignee or the expiration of a reasonable time therefor and prior thereto the provisions of the Act of Congress, approved August 8, 1890, c. 728, 26 State, 313 —the Wilson Act,—have no application. *License Cases,* 5 How., 504, 577; *Leisy* v. *Hardin,* 135 U. S., 100, 110; *Rhodes* v. *Iowa,* 170 U. S., 412, 426; *Vance* v. *Vandercook Co.* (No. 1), 170 U. S., 438, 444; *American Express Co.* v. *Iowa,* 196 U. S., 133, 142, 143; *Heyman* v. *Southern Ry.,* 203 U. S., 270, 276; *Adams Express Co.* v. *Kentucky,* 206 U. S., 129, 135; *Adams Express Co.* v. *Kentucky,* 214 U. S., 218, 222.

"The foregoing cases and those cited therein we also regard as controlling authority in support of the claim that the business carried on by plaintiff in error within the State of Kansas was interstate commerce. That the traffic moved by horse-drawn wagons from a point near the state line, instead of by railroad from a greater distance, does not change the applicable rule. Nor did the mere adoption of cumbersome and expensive methods render the business intrastate—that must be tested by the actual transactions."

The actual transaction of sale and delivery in the instant case takes place entirely within the State of Kentucky. In the case just cited the recital of facts shows

that all the orders were received from customers in Kansas, while the goods were in the warehouse at Stillings, Missouri, and all of the shipments were made from Missouri to customers in Kansas, pursuant to the orders thus received.

Applying the doctrine of the "test by the actual transaction" to this case, it seems clear that the merchandise was not moving in interstate commerce, and, therefore, the decision of the Court of Appeals should be affirmed, or the writ of error dismissed.

A. E. STRICKLETT,

Solicitor for City of Covington,

Defendant in Error.